CONNECTICUT STATE BOARD OF MEDIATION AND ARBITRATION
LABOR DEPARTMENT

38 WOLCOTT HILL ROAD
WETHERSFIELD, CONNECTICUT

Thursday, August 08, 2013

TRANSMITTAL MEMORANDUM

New Haven, City of
and
UPSEU
Local 424 Unit 34

Case # 2013-A-0235 *Williams, Simon*

ARBITRATION AWARD

Copies were sent to the following parties:

Brooke Sherer, Esquire
Scott Nabel, Public Safety HR Manager
Wayne A. Gilbert, Regional Director, UPSEU
Town Clerk*
File
Joseph M. Celentano, Esquire
J. Stuart Boldry
Helene H. Shay

*When applicable, this transmittal is filed with the town clerk in accordance with Section 31-98, Chapter 560, of the Connecticut General Statutes.

CONTACT PERSON

Helen E. Roy

STATE OF CONNECTICUT

DEPARTMENT OF LABOR

STATE BOARD OF MEDIATION AND ARBITRATION

ARBITRATION AWARD

In the Matter of Arbitration between City of New Haven and UPSEU	Case No.: 2013-A-0235 DATE OF AWARD: August 8, 2013 DATES OF HEARINGS: January 25, 2013 March 19, 2013 LOCATION OF HEARING: Labor Department Wethersfield, CT

APPEARANCES

For The City: Scott Nabel, Public Safety HR Manager

For the Union: Brooke Sherer, Esq.

Issue

Did the City have just cause to terminate the employment of Simon Williams?

If not, what shall be the remedy?

Relevant Contract Language

Article 18 Discipline

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Section 2.

All disciplinary actions shall be applied in a fair manner and shall not be incongruous to the infraction for which the disciplinary action is being applied.

Section 3.

Normally, unless otherwise provided in this Agreement, (a) a written warning, (b) suspension without pay and (c) discharge and shall ordinarily follow this order.

Section 4.

All disciplinary action may be appealed through the established grievance procedure.

Section 5.

(a) All suspensions and discharges must be stated in writing and a copy given to the Union and the employee.

(b) Employees shall only be discharged for just cause.

Section 6.

(a) All verbal warnings and written warnings shall be removed from an employees record after a period of one (1) year if there has been no reoccurrence of the infraction and the employee has a good work record. All other disciplinary records (i.e. suspensions, loss of bidding rights, reduction in grade) shall be removed from an employees work record after two (2) years if there has been no reoccurrence of the infraction and the employee has a good work record.

(b) Once an employee has satisfied the prerequisite of (a) above, the Employer agrees that it will never bring the warnings of suspensions up again.

Background of Proceedings

This dispute arose out of a grievance filed by the union on November 2, 2012 on behalf of Simon Williams (grievant), alleging that the city discharged the grievant without just cause in violation of Article 18 of the collective bargaining agreement. J. Exh. 2. On the same date, the parties reached an agreement to bypass the grievance procedure and proceed directly to arbitration. J. Exh. 3. On November 5, 2012, the Union filed a demand for arbitration with the State Board of Mediation and Arbitration. Hearings were held on January 25 and March 19, 2013 at which time the parties appeared, were represented and were provided full opportunity to present evidence, examine and cross-examine witnesses and make argument. Briefs were postmarked to the Board on April 29, 2013 and reply briefs postmarked May 20, 2013.

Facts

The grievant was employed by the city of New Haven from 1993 until his termination. He worked in the Refuse Department and his normal working hours were from 5:00 a.m. until 1:00 p.m. In January 2011, the grievant injured his left shoulder, neck and back at work. He was treated by Dr. Patrick Ruwe for his shoulder and by Dr. Shirvinda Wijesekera for his neck and back injuries. (The grievant testified that he had been seeing Wijesekera for years for his bulging disks in neck and back.)

In November 2011, Dr. Ruwe performed surgery on the grievant's shoulder E. Exh. 2. On January 19, 2012, Dr. Ruwe released the grievant for light duty work for eight hours each day effective January 23, 2012. His restriction was "no use of his left upper extremity." E. Exh. 2.

The City has a written policy designed to return injured employees to work as soon as medically reasonable to do so. J. Exh. 5. This policy entitled "City of New Haven Return to Work Program" sets forth the details of the program. One of the requirements is that each department head is required to develop a list of suitable work assignments that may be available in the department for light duty work. Id. Since the inception of the program the City has contracted with the Connecticut Interlocal Risk Management Agency (CIRMA) as a third party administrator.

John Prokop, at the time of this hearing, held the position of Director of Public Works. At the time of the grievant's release for work, Prokop's department had a light duty assignment available. In this case, the grievant was assigned light duty work at the office of the Division of Fleet Management from the hours of 7:00 a.m. to 3:00 p.m. His assignment required him to transfer hand written work orders from the mechanics work sheets and insert the information into a data base.

On January 20, 2012, the City informed the grievant of his new assignment. Sometime that day, the grievant contacted the Field Case Manager for the Coventry Workers Compensation Services (CWCS). An email record documenting that call by Sandra Cappello, RN CCM, the Field Case Manager for CWCS, indicated that the grievant had called her upset because the City wanted him to report to work for the hours of 7 a.m. to 3 p.m., which was at variance with his normal hours of 5 a.m. to 1 p.m. and interfered with and put his second job at risk. E. Exh. 14.

The grievant reported for work on January 23, 2012. E. Exh. 8. Upon returning to work the grievant spoke with Prokop and requested that his hours be changed to his original 5 am to 1 pm work schedule because the new hours would " not work" for his second job. Prokop explained that he could not accommodate his request because the garage opens at 7 am. and that Williams needed to be under the supervision of the fleet manager who did not report to work

until 6:30 a.m. Prokop explained that the grievant could not be left to work alone and unsupervised. The grievant responded "I'll take care of it."

The grievant, also on the 23rd, called Dr. Ruwe's office and spoke to Ruwe's secretary Nicole Bourque. As a result of this conversation, Dr. Ruwe's Work Status Report was modified to restrict the g's hours to 4-5 hours of work per day. E. Exh. 2. On February 6, 2012 the grievant had an office visit with Dr. Wijesekera for his neck and back injuries. Wijesekera suggested consideration of repeat cervical and lumbar epidurals. He also noted that he would defer to Dr. Ruwe's expertise. His Work Release Form mimicked Dr. Ruwe's revised form in that the grievant was returned to work with no use of his left arm and his hours were limited to 4-5 hours of work as tolerated. E. Exh. 1.

Sometime shortly after Dr. Ruwe's revised Work Release Form restricting the grievant's hours, Mr. Prokop called Ruwe's office questioning why the grievant's hours were changed just days after he had come back to work. He did not speak to Doctor Ruwe but was told that Dr. Ruwe would make contact with CIRMA.

On February 8, 2012, at a meeting with CIRMA representatives, Prokop expressed his unhappiness about Dr. Ruwe changing the grievant's hours. E. Exh. 15. A email record of that conversation was made by Joseph A. Salcito, a Senior Workers Compensation Claim Examiner for CIRMA. Also as a part of this email, Salcito noted that the grievant had advised him and Nicki at Doctor Ruwe's office that he had a concurrent employer and that if he did not return to his part time job he would be terminated. Id.

On February 14, 2012, Salcito sent Dr. Ruwe a letter by facsimile requesting an explanation for the change in the grievant's work hours. E. Exh. 16. Also on that date, the grievant had scheduled a follow up visit with Dr. Ruwe. Dr Ruwe's work release form for that visit indicates that he had received Mr. Salcito's fax and that the previous restriction of 4-5 hours

was "put forward to accommodate his [the grievant's] ability to perform his second job. I have today increased his capabilities and lifted his restrictions with regard to hours" E. Exh. 2.

On February 14, 2012, the grievant returned to work. E. Exh. 8. Despite the change in the Work Release Form by Dr Ruwe increasing the grievant's hours to eight hours, the City continued to honor Dr. Wijisekera's Work Release Form which limited the grievant's work schedule to 4-5 hours per day as tolerated. E. Exh. 3.

However, the Cityfiled a notice of intent to reduce or discontinue the grievant's benefits (Form 36) with the Workers' Compensation Commission. E. Exh. 4. It also authorized the law firm of Pomeranz, Drayton and Stabnick to further investigate the matter. Attorneys for the firm represented the City during this process. On June 15, 2012 the grievant was deposed. E. Exh. 13. On July 9, 2012, Dr. Ruwe was deposed. E. Exh. 2. At both depositions, the grievant was represented by his attorney Mark H. Pearson.

Dr Ruwe testified that he reduced the grievant's hours to accommodate his second job and that there was no medical reason for the grievant's restriction. E. Exh. 2.

At an August 3, 2012 informal hearing, Workers Compensation Commissioner Christine Engel verbally granted the City's request to reduce the grievant's benefits from the time period of January 19 through May 22, 2012. On January 18, 2013, Engel memorialized her August decision in writing. E. Exh. 4. At the time of the March 19, 2013 hearing before this panel, Attorney Pearson had filed a request for a trial de novo.

On August 9, 2012, Attorney Jason Dodge notified Mr. Salcito that Commissioner Engel approved the request to modify the grievant's benefits. E. Exh. 17.

On September 17, 2012, the City notified the grievant by certified mail of a pretermination hearing scheduled that hearing for September 24, 2012. E. Exh. 9. The basis for the hearing related to workers' compensation fraud. Id. The hearing was rescheduled to October

22, 2012. On November 1, 2012, the City notified the grievant that he was being terminated. E. Exh. 10.

The record reveals that the grievant has held a second job with an organization entitled "The Children's Community Programs of Connecticut" from 2008 to the present. His job title is Parent Educator, Fatherhood Home Visitor. Before his injury, the grievant worked from 1:30 p.m. until 7:30 or 8:30, typically 75 hours bi-weekly. He continued to work those hours after his injury and until his surgery. After surgery his hours decreased for approximately a month and then returned to a 75 hour bi-weekly schedule until he reported to light duty with the City. Upon returning to work with the City in January 2011, the grievant's hours at the Children Community Programs were reduced to 55 hours bi-weekly. E. Exh. 6.

The job description for the grievant's position of Fatherhood Home Visitor/Advocate required him to make visits to families "once a week to identify fathers involved with the family and to provide information , to assist fathers to play an active role in home visiting to improve parenting skills and support the families knowledge about child development." It also required him to "maintain accurate records of all client contact." Basic computer skills including the use of Word and Excel is a preferred skill for qualification to the position. E. Exh. 12. The grievant testified that he did have to document his visits and counseling sessions but not as frequently as before the surgery.

Position of the Parties

City

The City argues that it has clearly and convincingly shown that just cause existed to terminate the grievant. **See Brand, Ed. in Chief, Discharge and Discipline in Arbitration, p. 228.**

First, it is well settled that an employer does not need to promulgate a rule informing an employee that stealing is wrong and a dischargeable offense. The grievant's receipt over five months of workers' compensation benefits based upon a four hour work capacity when there was no medical reason for the reduced hours constitutes fraud.

Second, the employer's rule is reasonably related to the safe and efficient operations of the workplace. The City's policy of returning injured employees to modified work assignments is consistent with the employee's medical restrictions and also "plays a key part in workers' compensation disability management. It offers the opportunity for significant savings in workers' compensation claims costs and provides a formal mechanism to redirect injured employees back into the active work force." J. Exh. 5, p. 1.

In addition, the City conducted an investigation before it terminated the grievant. Of particular significance was Dr. Ruwe's admission that he had limited the grievant's hours of employment with the City to accommodate his secondary employment. See E. Exh. 2, Ruwe's office notes dated 2/14/12. Also, Ruwe testified against his own interest that he made the change to accommodate the grievant's ability to work his second job. E. Exh. 2, pgs. 10-12.

This investigation was conducted fairly. There is nothing in the record that suggests that the investigation was anything less than fair and objective. The issue of the grievant's work capacity was presented and adjudicated before Commissioner Engel, who ruled in the City's favor. The grievant was represented in that forum by his attorney Mark Pearson. Additionally, at his pretermination hearing, the grievant was represented by a union representative. At that hearing the grievant had every opportunity to call witnesses and supply documentation.

Also, the investigation produced substantial evidence or proof that the employee was guilty as charged. His work capacity was evaluated by Commissioner Engel who determined that he was capable of working a full eight hour day and as a result credited the city with over seven thousand dollars. The evidence shows that the grievant was motivated to work as many

hours as possible at his second job and he thought that by having Dr. Ruwe reduce the number of hours he could work for the city would allow him to work his normal load with his secondary employer. Dr. Ruwe testified unequivocally that he changed the grievant's hours to accommodate his second job. Moreover, Dr. Brittis' independent evaluation dated March 23, 2012 does not support the more limited light duty work capacity argued by the grievant. Brittis was aware of the fact that the grievant was being treated for concurrent neck injury but failed to express any concerns with its impact on the grievant's ability to be released to light duty. Moreover, Dr. Wijesekera deferred to Dr. Ruwe during the time period at issue. Clearly, the evidence reveals that the problem for the grievant to perform the work of data entry was not due the physical duties it required but rather the hours that he was assigned.

In addition, the rules and penalties were applied in an even handed manner. There was no evidence that the City treated the grievant in a discriminatory manner nor was there any evidence that others who engaged in comparable misconduct received less discipline.

Finally, the degree of discipline was reasonably related to the employee's proven offense. His conduct essentially amounts to theft and demands the penalty of discharge. In cases of theft "arbitrators usually don't require progressive discipline. [Theft] offenses tend to warrant summary discharge because the act, conduct or behavior is inimical to employer-employee trust." **Brand, Ed. in Chief, Discharge and Discipline in Arbitration, pgs.226-227 (1998).**

Union

The Union first argues that the City failed to conduct a fair and objective investigation. In order to conduct a fair investigation the City needed to actively search out witnesses and conduct an inquiry into possible justification for the employee's alleged rule violation. The City clearly failed to interview or even contact witnesses who had direct knowledge of the facts underlying the alleged workers' compensation fraud. Instead, the City relied solely on the hearsay

testimony of Dr. Ruwe and failed to contact or depose Ms. Bourque, Dr. Ruwe's assistant. She was the only person besides the grievant who had personal knowledge of what was discussed regarding the reduction of hours. The City also failed to interview Dr. Wijesekera regarding his reasoning behind his four to five hour work restriction. Although Dr. Wijesekera's February 6, 2012 visit notes indicate that he would "defer to Dr. Ruwe's expertise" there is no evidence that he relied on Dr. Ruwe's work status report when issuing this restriction.

In addition, at the pretermination hearing, the Union raised several issues, among them was the fact that the grievant continued to experience pain while performing his light duty assignment. Although the City concluded that based upon Mr. D 'Angelo's representation that the data entry mostly involved drop down menus with minimal typing, testimony from both the City and Union witnesses at the arbitration hearing contradicts this assertion. The City also failed to investigate the Union's claim that his light duty assignment was vastly different from the work performed at the Children's Community Center. Moreover, the City waited at least eight months before disciplining the grievant for alleged workers' compensation fraud. Specifically, the alleged fraud began in January 2012 yet the grievant's pretermination hearing was not scheduled until September 2012. If the grievant actually admitted to Prokop that he committed fraud in January, the City would not have waited eight or nine months before investigating and disciplining him.

The Union also contends that the City did not prove by clear and convincing evidence that the grievant committed worker's compensation fraud. The City relied solely on Dr. Ruwe's deposition testimony. However, as made clear by Ruwe's deposition testimony, Ruwe did not have personal knowledge regarding the reasons why the grievant contacted his office. On the other hand, the grievant testified that he was in pain after sitting behind his desk for eight hours per day and he called Dr. Ruwe's office because of that discomfort. He spoke with Ms. Bourque. She was aware of his second job but the grievant did not state that he wanted

accommodation for his second job. If anything, there was a miscommunication between the grievant and Ms. Bourque. The City never questioned Ms. Bourque and in failing to do so it failed to obtain any direct evidence of workers' compensation fraud.

The investigation also failed to produce substantial evidence that the grievant sought a reduction in hours to accommodate his second job. When he returned to work on January 19, 2012, and following his reduction in hours by Dr. Ruwe, the grievant's hours were from 11:00 a.m. to 3:00 p.m. These hours had no effect upon his second job. The Children's Community Program was able to accommodate the change in hours as it had done in the past. It is not logical that the Grievant would seek a restriction in hours to accommodate his second job when the restriction had no effect at all on that job.

At the arbitration hearing, Director Prokop testified that the grievant told him that he was going to get his hours reduced because of his second job. This testimony was not credible. The grievant testified that Prokop flew into a rage after learning of the change in hours and threatened to go after him. The grievant was never questioned at his deposition regarding the alleged statement made by Prokop.

In addition, after Dr. Ruwe modified the grievant's hours, the grievant did not perform any work for the City for two weeks (January 31 through February 13). During that period, Wijesekera saw the grievant and released him for four to five hours a week based upon his neck and back injuries. When the grievant returned to work on February 14, 2012 his restrictions were based upon Dr. Wijisekera's work release form. Wijesekera was treating different injuries and parts of the body than Dr. Ruwe. His work status reports were not based upon Dr. Ruwe's work release. On May 2, 2012, Dr. Wijesekera became aware that Dr. Ruwe had released Mr. Williams for eight hours of work in February. However, Dr. Wijesekera continued to restrict the grievant's hours until August 13, 2012. Yet the City failed to interview Dr. Wijesekera regarding

his restrictions. In addition, it failed to bring the grievant back to work to a full eight hour day. Clearly, the City's evidence did not provide any direct proof of fraud.

Finally, the Union argues that the discipline administered was not reasonably related to the seriousness of the alleged offence or to the grievant's service to the City. This element of just cause requires the punishment to be proportionate to the offense, taking into account the harm to the employer resulting from the employee's conduct, the underlying seriousness of the conduct, the employees work history and the length of service.

As mentioned above the City did not have strong evidence that the grievant committed workers' compensation fraud. And even assuming that the grievant intended to commit fraud, there was no harm to the City. Dr. Wijesekera, despite Dr. Ruwe's eight hour work release, continued to restrict the grievant's hours to four to five hours daily.

The City also was not harmed because the alleged conduct could have been resolved through the workers' compensation forum. Although the City was initially granted a credit, this issue was still being litigated at the conclusion of this arbitration hearing. If the City felt there was substantial evidence of fraud, the City could have referred the matter to the fraud unit of the Workers' Compensation Commission. The State's Attorney did not feel there was enough evidence to take the case.

Finally, the grievant has worked for the same department for the City for nineteen years. He was promoted to a driver position. At the time of his termination there was no discipline in his file. Terminating the grievant was a severe penalty in light of the lack of evidence and his good work record. Thus the discipline was not reasonably related to the seriousness of the allege offense.

Discussion

The issue in this case is whether the City had just cause to terminate the grievant. In determining whether a particular discipline or discharge was for just cause, arbitrators have come to apply a seven part test formulated by **Arbitrator Daugherty in Enterprise Wire Co., 46 LA 359 (1969)**. This test requires: 1.) notice to the employee that his conduct was unacceptable and would have serious consequences; 2.) a reasonable rule related to the employer's business for which the employee has violated; 3.) an investigation made prior to the discipline; 4.) the investigation is conducted fairly and objectively; 5.) at the investigation, the investigator found the employee was guilty as charged; 6.) the employer has applied discipline for similar violations equally without discrimination; 7.) a penalty reasonably related to the violation. **See also Koven and Smith, Just Cause The Seven Tests, 2nd Ed. 1992.**

It is well settled that the employer has the burden of proof to show that the discharge was for just cause. This includes the question whether the level of discipline was appropriate in view of the grievant's past work record and disciplinary history. Burden of proof is a judicial concept that designates the party that has the obligation of establishing by evidence the ultimate fact. **See Hill and Sinicropi, 2nd Ed. Evidence In Arbitration, BNA, 1987, p. 39.** Based upon the record evidence, we conclude that the City has proven by a preponderance of the evidence that it had just cause to terminate the grievant.

The Conduct of the Investigation

The Union first contends that the investigation was not fair or objective. It claims that in order to meet this test, the City's investigation should have actively searched out evidence and interviewed other witnesses. The City failed to interview or even contact witnesses who had

direct knowledge of the alleged workers' compensation fraud, specifically Nicole Bourque, Dr Ruwe's assistant, and Dr. Wijesekera.

We believe that the City acted promptly and fairly and conducted an extensive investigation. The grievant was released for work by Dr. Ruwe on January 19, 2012 for light duty for a full eight hour shift. Once the grievant returned to work he asked Director Prokop if he could maintain his prior hours. When Prokop explained that he could not accommodate his request for operational reasons, the grievant stated that he "would take care of it." On January 23, 2012, (the same day he had returned to work), he contacted Dr. Ruwe's office and spoke to his assistant Nicole Bourque. This communication resulted in the grievant's hours being reduced to 4-5 hours per day. Understandably, Prokop was puzzled by this sudden change in status and sought clarification from Dr. Ruwe. Not receiving an explanation from Ruwe, he informed CIRMA, the third party administrator of his concerns. CIRMA's representative, Joseph Salcito then contacted Ruwe's office requesting an explanation. Ruwe's Work Release Record dated February 14, 2012, reestablished the grievant's prior work hours, i.e. 8 hours per day and acknowledged that the 4-5 hour previous restriction "was put forward to accommodate [the grievant's ability] to perform his second job". E. Exh. 2. Salcito then authorized the law firm of Pomeranz, Drayton and Stabnick to depose Dr. Ruwe and the grievant.

The City took no immediate action against the grievant and continued to allow him to work a reduced 4-5 hour a day scheduled. However, it continued with its investigation which included a request to the Workers' Compensation Commission to reduce or discontinue the grievant's benefits because it believed that the reduction in hours was not medically supported. Ultimately, Commissioner Engel granted CIRMA's request that the grievant's temporary partial

benefits in the amount of $7, 599.30 were to be credited to the City. E. Exh. 4. This ruling formed the basis of the City's decision to terminate the grievant.

The Union further argues that the City had relied solely on Dr. Ruwe statements and failed to interview him or contact him before or after his deposition. His testimony was also hearsay and not reliable.

This is not accurate. The City did not rely solely on Ruwe's statement of February 14, but instead pursued a determination with the Workers' Compensation Commission to eliminate the grievant's benefits. As a part of that proceeding, the City's representatives deposed Dr. Ruwe. Ruwe's testimony at his deposition was administered under oath and the grievant's attorney was present during these proceedings. The grievant's attorney had an opportunity to cross examine Dr. Ruwe. Although technically hearsay, the traditional objections are not present here. Ruwe's testimony was under oath and subject to cross examination. Clearly, his testimony was subject to a more rigorous examination then what would have occurred during a preliminary investigation. Thus, we see no reason not to credit Ruwe's testimony before the Workers' Compensation Commission.

The Union also contends that the City never contacted, deposed or interviewed Dr. Ruwe's assistant Nicole Bourque and that her conversation with the grievant was the sole basis for the change in hours. While it is true that the City did not interview Bourque, Ruwe explained during his deposition testimony that Bourque would not have made the decision regarding the reduction in hours. She was not a trained medical professional and could not make any decision regarding the grievant's hours of work. Rather, she would have passed along the grievant's request to him. Ruwe clearly recalled that the grievant's reduction in hours was to accommodate his work schedule at his second job and was not for any reason related to the surgery. Bourque's

testimony would not have added any additional information regarding the reason for the grievant's change in hours.

The Union makes the same complaint about Dr. Wijesekera. But Wijesekera had no role in reducing the grievant's hours just days after he was cleared to return to light duty full time. Dr. Ruwe was solely responsible for initially deciding that the grievant could return to work and then changing that decision abruptly to accommodate the grievant's second job. Thus, interviewing Wijesekera would not have provided the City with any information regarding the grievant's ability to return to full time work as of January 19, 2012. Moreover, the grievant was represented by his attorney during the City's attempt to discontinue his workers' compensation benefits. There is no evidence that he subpoenaed Dr. Wijesekera as a relevant witness in those proceedings or made the argument that Dr. Wijisekera's diagnosis was in any way relevant to the dispute.

As for Wijisekera's role, the record reveals that he had been seeing the grievant for a number of years for bulging discs in both his neck and back and had recommended injections to help manage the pain. But there is no evidence that Wijesekera had restricted the grievant's work hours prior to his shoulder surgery. And less we lose sight of the obvious, despite the fact that the grievant had been treated by Wijesekera for pain for some time, he was working full time performing his normal duties when he incurred his shoulder injury in 2011. Thus, whatever restrictions Wijesekera placed on the grievant's return to work, it was based on Dr. Ruwe's assessment to reduce the grievant's hours to accommodate his second job. E. Exh. 2.

The Union also claims that the City failed to fully investigate the claims that the grievant raised at his pretermination hearing, namely that he continued to experience pain while performing his light duty assignments. The City also failed to investigate fully the amount of

typing involved and the level of detail required by the grievant while typing information on the invoices.

Whether or not the grievant continued to experience pain while performing light duty is not relevant to our disposition of the case. The grievant's clearance to return to work was not a guarantee that he could work pain free but simply that he was fully able to work full time albeit with some limitations. At any rate, the City did in fact further investigate whether the grievant had ever complained and discovered that the grievant had never mentioned his pain to D'Angelo or Prokop which was corroborated by their testimony before this panel. And while there was a great deal of testimony introduced by the Union about the level of complexity with regard to the invoices that the grievant was required to enter into the system, the level of detail had no impact on his restrictions. The grievant could still type with his right hand. The fact that it may take him longer was not an issue. It was well understood, as testified to by the City's witnesses, that the grievant had no set quota or daily requirement and that he could peck at the keyboard at his own pace. And despite the grievant's assertion that he felt pressure to produce more work, there is no evidence that D'Angelo or Prokop ever pressured the grievant to produce faster results. In addition, the grievant also could take repeated breaks and get up from his desk and deliver paperwork to other offices in the main building.

Finally, even if the grievant did complain to Ruwe before or on February 14, 2012, Ruwe apparently was not persuaded that the grievant's job duties were either the cause of his pain or was significant enough to rescind his return to work instructions. In fact, Dr. Ruwe decided during the February visit to return the grievant to full time duties (his original diagnosis). At that time, he told the grievant that he could not continue to honor the grievant's request for a reduced schedule due to the grievant's obligations to his secondary job. Clearly, the preponderance of the

evidence reveals that the job duties that the grievant was assigned as light duty met the restrictions imposed by Dr. Ruwe.

Proof of Fraud

The Union next argues that the City did not prove by clear and convincing evidence that the grievant committed workers' compensation fraud. [1] It claims that the City relied solely on Dr. Ruwe's deposition testimony and that reliance is misplaced since Ruwe did not have a conversation with the grievant between January 19th and February 14th. It also points to the grievant's deposition testimony and the testimony before this panel as clear evidence that the grievant did not attempt to have his hours reduced and characterizes his conversation with Ms. Bourque as a miscommunication. Moreover, the secondary employer was able to accommodate his second job as it did in the past and it would be illogical for him to seek a change in hours if the hours had no effect on that second job.

We disagree. We find that the evidence proves that the grievant attempted to modify his work hours and represented to the city's representatives and to Dr. Ruwe's assistant that it was for the purpose of accommodating his second job.

We turn first to Dr. Ruwe's testimony at his deposition which clearly reveals that there was no medical reason for reducing the grievant's hours of work but rather the change was made solely to accommodate the grievant's second job. Dr. Ruwe repeatedly and unequivocally

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[1] For most arbitrators the normal quantum of proof required to in disciplinary cases is a preponderance of the evidence. See **Elkouri and Elkouri, How Arbitration Works, 6th Ed. p. 949, Rittman Nursing and Rehabilitation Center, 113 LA 284, (Kelman, 1999).** It is this standard that will be applied in this case.

testified that the sole reason he changed the grievant's hours was to accommodate the grievant's other employment:

> "We were trying to accommodate his ability to work his second job as requested." E. Exh. 2, p. 12.
>
> "And the answer was the same. That we were trying to accommodate his ability to work his second job. And Joe [Salcito] said, you know, that we can't honor that, and we said okay." Id.
>
> "We were trying to accommodate his second position absolutely". Id.

Dr. Ruwe's testimony is corroborated by the grievant's Work Release Form dated February 14, 2012 authored by Dr. Ruwe. After CIRMA's representative, Salcito, inquired about the grievant's sudden reduction in hours, Ruwe wrote the following:

> "In specific reference to questions posed by Mr. Joseph Salcito in a February 14, 2012 fax communication, Mr. Williams' previous restriction of four-to- five hour day was put forward to accommodate his ability to perform his second job. I have today increased his capabilities and lifted his restrictions with regard to hours." E. Exh. 2

Dr. Ruwe's testimony is corroborated by Director Prokop. He testified that when the grievant met with him to request a change of hours, which he denied, the grievant responded that he "would take care of it."

Prokop's testimony is further supported by a business record dated January 20, 2012, just one day after the grievant was released for light duty work. It reveals that the grievant contacted CIRMA's Field Case Manager complaining about his hours, telling her that they interfered with

his second job which began at 1:30 p.m. Joseph Salcito, the Senior Claims Examiner for CIRMA, testified that the grievant contacted him and told him that he would be terminated from his concurrent part time job if he could not start at 2:00 p.m. See also E. Exh. 15.

Moreover, despite the grievant's assertion that he had complained about the pain he was experiencing we find his testimony not credible. Edward D'Angelo, the City's Manager of Fleet Operations testified that during the period that the grievant was assigned light duty in his office he never complained about being in discomfort. Prokop testified that the grievant never at any time complained to him that his light duty assignment was causing him pain and that the pain caused him to contact Dr. Ruwe for a reduction in hours.

Finally, there is the grievant's testimony which we find to be completely unreliable as to the essential facts of the case. His testimony was not only rebutted in detail by the City's witnesses and the documentary evidence presented, it was also inconsistent and contradictory throughout; both at his deposition and in his testimony before this panel.

At his deposition, the grievant initially stated that he talked to Dr. Ruwe. He stated that he "When I went back to work, it wasn't working out too well. I had pain in my hand and wrist when I was typing. So I called and told him [referring to Dr. Ruwe] about that then when he reduced my hours." E. Exh. 13, p. 34, lines 1-4.

Also during his deposition, he stated "I did tell him [referring to Dr. Ruwe]—that the Director of Public Works changed my hours, and it would effect my ability to the second job, but that wasn't solely the reason. " Id, P. 35, Lines. 22-25.

Further testimony indicates that the grievant had a conversation with Dr. Ruwe about his hours:

> Q. But isn't that what you were mostly concerned about Mr. Williams, at the time, that you wanted to make sure that you could still do your second job?

A. No.

Q. But the hours were interfering with your second job, correct?

A. Yes. Id. p. 36, lines 1-8.

Q. So that was part of the reason that you wanted the hours changed, is that fair to say?

A. Well no. I had mentioned it to him, and –but the main issue was that my neck was bothering me, and my left arm was being effected by the duties I was doing. Id. p. 36, lines 23-25, p. 37, lines 1-3. (emphasis added)

Further along in his deposition testimony, the grievant changed his testimony claiming that he did not have a conversation with Ruwe on the phone but rather the conversation was with Ruwe's assistant Nicky. He also changed his testimony as to whether he mentioned the second job. He claimed that it was during his conversation where he complained about his shoulder and arm and told her he needed the injections.[2] When asked whether he or Nicki suggested reducing his hours he responded "I can't remember" E. Exh. 13, p. 38, line 1.

The grievant, when asked how he could have told Dr. Ruwe that his arm was bothering him because of the typing if he had not yet gone back to work [a prior statement in his testimony] the grievant stated that he had complained to Ruwe before returning to work that his shoulder still bothered him and Ruwe responded that we will try eight hours and see how it goes. Id. p. 38, lines 8-16.

At the arbitration hearing, he contradicted his deposition testimony claiming that he never mentioned his second job to Ruwe's assistant Nicki and it was Nicki who brought up the 4-5 hour restriction. Specifically, he stated that Dr. Ruwe directed him to contact him and after a few shifts he called Ruwe's office and spoke to Nicki about his pain and she later called him back

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[2] We note that there was no evidence that Ruwe had ever recommended or even mentioned that injections should be given to the grievant for his shoulder.

and told him of the restriction. [The evidence reveals that the grievant called Ruwe's office the same day he returned to work.]

Clearly, the grievant cannot be believed. First, the grievant claims he had a conversation with Ruwe and that he did mention his second job during the conversation. Within the same deposition he contradicts himself, claiming that he had a conversation with Ruwe's assistant Nicki and not Dr. Ruwe and that he did not mention his second job to her. He also claims that he wasn't sure who mentioned the reduction in hours. At the hearing before this panel the grievant adamantly insisted that he never mentioned his second job to Nicki and it was Nicki who suggested the reduction in hours.

From the above, the City had a substantial amount of evidence that revealed that the grievant deliberately and deceptively attempted to have his light duty hours changed and reduced based not upon his inability to perform the work but for other reasons. The City made its decision to terminate the grievant based on the decision of Commissioner Engel of the Workers' Compensation Commission granting the City's request to discontinue the grievant's benefits. Engel also determined that the grievant was not entitled to benefits retroactive to January 19, 2012. And although Commissioner Engel never characterized the grievant's behavior as fraudulent the clear implication of her decision is that that the grievant received a benefit that he was not legally entitled to. Moreover, the evidence reveals that this benefit was not the result of some miscommunication or mistake as the Union wishes us to believe but rather the result of the grievant's intentional deceit. A common definition of fraud is: 1. deceit, trickery, sharp practice, or breach of confidence, perpetrated for profit or to gain some unfair or dishonest advantage.... **The Random House Dictionary of the English Language, 2nd Ed. Unabridged, p. 762, 1987.**

Finally, we turn to the argument that it would have been illogical for the grievant to make the assertion that his hours needed to be changed in order to accommodate this secondary employment when in fact the secondary employer had historically been flexible regarding his hours. We cannot ascertain the grievant's motive for making this assertion but it is clear from the evidence that he repeatedly claimed that he needed a change in hours because of his secondary employment in conversations with Director Prokop, Dr. Ruwe's assistant Bourque, and to several representatives of CIRMA. The fact that the need to maintain his second job may not have been the real reason for his request does not alter this evidence or minimize the seriousness of the offense.

The Penalty Imposed

The Union next argues that the discipline of discharge was not reasonably related to the seriousness of the alleged offense or Mr. Williams' service to the City. It first contends that the City's evidence was not strong that the grievant committed workers' compensation fraud. Moreover, after Dr. Ruwe released the grievant to work eight hours a day, the City continued to employ the grievant for four hours based upon Dr. Wijisekera's work restrictions which were not related to Dr. Ruwe's work restrictions. These restrictions were based upon the grievant's neck and back injuries and not based on accommodating his second job.

Moreover, the City never referred the issue of overpayment to the fraud unit of the Workers' Compensation Commission and the State's Attorney's office did not feel that there was not enough evidence to take the case. Finally, there is the grievant's long standing work history of nineteen years and at the time of his discharge there was no discipline in his file.

We conclude that the City has presented substantial proof (as we have listed above) that the grievant intentionally and deceptively manipulated his doctor to reduce his hours and that he received workers' compensation benefits to which he was not entitled to.

The fact that the grievant continued to work reduced hours after Dr. Ruwe's February 14, 2012 work release form reinstating him to full time work, does not change or minimize the grievant's misconduct. Although the City had suspicions mid-January about the grievant's motives to reduce his hours, the decision to terminate was made after the workers' compensation commission procedures were finalized which did not conclude until August. During that time period there were several hearings including the deposition of Dr. Ruwe and the deposition of the grievant. Once Commissioner Engel made her decision in August, that decision was communicated to the City by the City's attorneys and on September 17, 2012, the City notified the grievant of a pretermination hearing. There was nothing unreasonable about this delay.

In addition, there was no credible evidence introduced by the Union in this proceeding or by the grievant's attorney during the workers' compensation process which reveals that Wijesekera was restricting the grievant's hours of work solely upon the grievant's longstanding neck and back pain. The grievant had been seeing Wijesekera for this pain prior to his shoulder injury but there was no evidence that Wijesekera had placed any work restrictions upon the grievant at any time prior to his surgery. Rather, Wijesekera indicated in his February 6, 2012 letter and Work Release Form that he was deferring to Dr. Ruwe's expertise. E. Exh. 1. And although Wijesekera continued to restrict the grievant's hours after a subsequent visit in May, there is no credible evidence that Wijesekera was made aware that Dr. Ruwe had returned the grievant to full time on February 14, 2012. (The Union claims that by May, Dr. Wijesekera knew that Dr. Ruwe had returned the grievant to work full time work on light duty and yet continued to

restrict his hours. But this assertion is based solely on the grievant's testimony which we do not credit. If Wijesekera did have knowledge of Dr. Ruwe's revised work release, he was never deposed by the grievant's attorney during the workers' compensation commission proceedings.)

We also find that the Union has mischaracterized Mr. Salcito's testimony regarding the states' attorneys' decision not to prosecute the grievant. Salcito's testimony was that the state's attorney office did not wish to devote its limited resources for a case in which the City already had received a remedy in the form of a credit by the Workers' Compensation Commission. Their decision is understandable. Moreover, the fact that an employee's misconduct was not found to be worthy of a criminal prosecution is not determinative as to whether there is just cause for discharge. The parties have negotiated an arbitration process and the issue, standards of proof, and remedies available in such a proceeding are simply not the same as the issues presented in a criminal proceeding. Clearly, we are not bound by a prosecutor's decision not to prosecute an employee. **See Koven and Smith, Just Cause The Seven Tests, 2nd Ed. BNA, pgs. 289-291.** In this case, the City's evidence revealed that the grievant's conduct was serious and warranted severe discipline.

We next turn to the Union's contention that there exist several mitigating factors that should result in a penalty less severe than the penalty of discharge. These are the grievant's long employment history with the City and the lack of any disciplinary action in his file.

It is clear that an employer may impose a harsher penalty for an employee with a short term work history and poor performance problems than for an employee with a substantial work history without disciplinary problems. **See Koven and Smith, supra. p. 394**. We do not dispute that the grievant has a long work history with the City and that the City has presented no evidence of any past disciplinary problems. However, the collective bargaining agreement

requires the City to remove any disciplinary records older than two years if there is no reoccurrence and bars it from raising past discipline in a future proceeding. Thus, we cannot properly weigh the Union's argument that he had a longstanding history without prior discipline.

Even if we assume that the grievant had a flawless work record it would not affect our decision here. First, this is not a case of a single error in judgment or a negligent misstep. By his actions, he was able to work part time and receive full time pay, knowing full well that he was not entitled to receive those benefits without working a full eight hours. To be sure, Dr. Ruwe made the decision to reduce his hours knowing that the change was not medically necessary and we can't excuse that decision. But Ruwe's decision was motivated by his desire to help his patient retain his second job. There can be no dispute that the grievant successfully manipulated his doctor to change his hours and received a benefit over a substantial period of time which he knew or should have known that he was not entitled to by law. The grievant's conduct amounted to theft, a very serious violation, which breaches the fundamental principles of the employer-employee relationship. **Brand and Biren, Editors, 2d. Ed, Discipline and Discharge in Arbitration, p. 294, 2008.**

It is true that some arbitrators would consider mitigation of a penalty in cases of theft, depending on the value of the item taken, the employee's employment record, the harm to the employer, the motivation of the employee, or attempts to deny the act. **Id. p. 294.** In total, these factors do not weigh in the grievant's favor. In particular, the grievant, during this entire process, has continued to deny his wrongdoing and instead has invented a version of the events, which at times trips over itself, and which is contradicted by all of the City's witnesses. And he has failed to provide this panel with any motivation as to why these individuals would give false testimony. Thus, we conclude that mitigation of the grievant's penalty is not warranted.

Award

The City did have just cause to terminate the employment of Simon Williams.

Attorney Joseph M. Celentano-Chairman – Alternate Public Member

Helene H. Shay-Panel Arbitrator- Alternate Labor Member

J. Stuart Boldry -Panel Arbitrator- Alternate Management Member